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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HECTOR SOTO,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the retroactivity test applied in habeas corpus challenges to state judgments of conviction, as set forth in *Teague v. Lane*, 489 U.S. 288 (1989), limit the availability of relief on a motion under 28 U.S.C. § 2255 asserting that a federal sentence must be corrected due to error under *United States v. Booker*, 543 U.S. 220 (2005)?

2. If *Teague* is applicable, did *Booker* announce a "watershed rule" of criminal procedure in holding that sentences imposed under the mandatory United States Sentencing Guidelines are constitutionally infirm unless every fact essential to sentence was proved beyond a reasonable doubt?

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JURISDICTION

The judgment of the Second Circuit U.S. Court of Appeals of which petitioner Hector Soto seeks review was entered July 16, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The decisions below of the Second Circuit, App. 1a to 2a, and of the United States District Court for the Eastern District of New York, App. 3a to 4a, were not reported.

NOTIFICATION OF SOLICITOR GENERAL

Pursuant to Rule 29.4(a), service of this petition has been made upon the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of 28 U.S.C. § 2255, and of the Fifth and Sixth Amendments to the United States Constitution, is set out in the appendix at App. 21a to 23a.

STATEMENT OF THE CASE

On October 22, 1999, following a jury trial, petitioner Hector Soto was sentenced in the Eastern District of New York to a term of 292 months incarceration, five years supervised release, and a special assessment of $300. App. 20. He is presently in custody at the McKean Federal Correctional Institution at Bradford, Pennsylvania, with a projected release date of August 28, 2019.

Mr. Soto had been convicted of offenses relating to the distribution of a controlled substance, including a homicide in violation of 21 U.S.C. § 848(e)(1)(A). Under that statute, a defendant may be sentenced to 20 years or more imprisonment, or to death. At the sentencing proceeding, the district court reminded trial counsel that the sentence computed in Mr. Soto's Presentence Report ("PSR") — life imprisonment — was "not a recommendation. It's the

guidelines." App. 13a. The court also confirmed that it did not "intend to ignore the guidelines." App. 17a.

The court then took note of the "extraordinary rehabilitation" achieved by Mr. Soto in the period since the criminal conduct. App. 17a. Specifically, Mr. Soto had become a commissioned federal officer with the United States Border Patrol and a devoted husband and father of a four-year-old daughter. App. 9a to 12a, 15a to 16a.

The court also found, however, that Mr. Soto had perjured himself when he testified in his own defense at trial. App. 17a. This finding reiterated a conclusion set forth in the PSR to support a two-level increase of Mr. Soto's offense level pursuant to Section 3C1.1 of the Guidelines for obstruction of justice. *See* Doc. No.[1] 10 Ex. D at 2. Although Mr. Soto's 292-month sentence was less severe than the life sentence calculated in his PSR, the term exceeded the 20-year statutory baseline by more than four years. The district court explained that, but for its perjury finding, it would have imposed a shorter term of incarceration. App. 18a.

The Second Circuit U.S. Court of Appeals affirmed by order dated November 7, 2000. Doc. No. 10 Ex. D at 2-3. Rejecting Mr. Soto's contention that his sentence had been improperly enhanced, the court of appeals stated that the "Sentencing Guidelines require a two-step increase in offense level" for perjury. *Id.* at 2.

On January 12, 2005, this Court announced decision in *United States v. Booker*, 543 U.S. 220, holding that the Guidelines, as enacted, violated the Constitution insofar as they required that sentences be increased above the maximum authorized by facts admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 235, 244. The Court directed *Booker*'s application in all cases on "direct review"

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[1] References to "Doc. No." identify the numbers assigned filings in the district court.

without specifically addressing the decision's application to motions under 28 U.S.C. § 2255. *Id.* at 268.

Roughly six months after the Court's *Booker* decision, Mr. Soto filed a *pro se* motion to correct sentence under § 2255. Doc. No. 1. The district court had jurisdiction pursuant to § 2255 and 18 U.S.C. § 3231, and the motion was assigned as a matter of course to the judge who had presided over Mr. Soto's original sentencing. Doc. No. 2.

A § 2255 motion is timely if filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 para. 6(3). In his motion, Mr. Soto asserted error in violation of the rule announced in *Booker*. Doc. No. 1 at 26 (Pet. at 21).[2] He asked the court to bear "in mind[] that the primary purpose" of his motion was "to secure a resentencing hearing" so that his punishment would reflect "a term consistent with the jury's verdict alone." Doc. No. 1 at 7 (Pet. at 2); *id.* at 30 (Pet. at 25). By supplemental filing, Mr. Soto specifically asserted that the district court's perjury enhancement was error under *Booker*. Doc. No. 5 at 9-10.

On June 5, 2006, while Mr. Soto's motion was pending in the district court, this Court issued a writ of *certiorari* to the Ninth Circuit U.S. Court of Appeals to determine a closely related question, namely, "whether our decision in *Blakely v. Washington*, 542 U.S. 296 (2004), announced a new rule and, if so, whether it applies retroactively on collateral review." *Burton v. Stewart*, 127 S. Ct. 793, 794 (2007). In *Blakely*, the Court held the State of Washington's former determinate

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[2] Page 26 refers to the district court's numbering of Mr. Soto's filing, which included a five-page form application followed by a separately captioned, 25-page briefing. Page 21 refers to the numbering of the separately captioned briefing.

sentencing scheme unconstitutional because it provided for sentence to be enhanced on the basis of facts not admitted by the defendant or proved to a jury beyond a reasonable doubt. 542 U.S. at 303. Citing and discussing numerous precedents of this Court, the petition for *certiorari* in *Burton* specifically contended that *Blakely* had announced a "watershed" rule warranting retroactive application. *See* Pet. for Writ of Cert. at 14 to 16, Case No. 05-9222 (Feb. 10, 2006).

Following the grant of *certiorari* in *Burton*, the district court ordered the United States Attorney for the Eastern District of New York to show cause why Mr. Soto's motion should not be granted. Doc. No. 9. Responding by letter brief dated September 29, 2006, the United States argued that Mr. Soto's motion was not timely under 28 U.S.C. § 2255 para. 6(3) because the Second Circuit had held in *Guzman v. United States*, 404 F.3d 139 (2d Cir.), *cert. denied*, 126 S. Ct. 731 (2005), that *Booker* "does not apply retroactively to cases on collateral review." Doc. No. 10 at 10. In subsequent proceedings, the United States expressly acknowledged that Mr. Soto's motion was timely "if *Booker* is made retroactive." Decl. in Supp. of Mot. for Summ. Affirm. at ¶ 3 & n.1, Second Circuit Case No. 07-0950 (Mar. 22, 2007).

On January 9, 2007, while Mr. Soto's motion was still pending, this Court resolved the *Burton* appeal on which *certiorari* had been granted. The Court held subject matter jurisdiction to have been lacking, *Burton*, 127 S. Ct. at 796, and accordingly could not reach the retroactivity question on which review had been granted.

In an unpublished memorandum order dated March 6, 2007, the district court held Mr. Soto's motion untimely under the controlling Second Circuit authority of *Guzman*. App. 3a to 4a. Taking note of the writ of *certiorari* and subsequent decision in the *Burton* case, however, the district court granted Mr. Soto a certificate of appealability and appointed counsel for the express purpose of facilitating this

Court's consideration of whether *Booker*'s reasonable doubt rule should be given retroactive effect. App. 4a.

On July 16, 2007, the Second Circuit granted the United States' motion for summary affirmance of the order holding Mr. Soto's motion untimely under *Guzman*.[3] App. 1a to 2a.

REASONS FOR GRANTING THE WRIT

Mr. Soto's petition presents an opportunity for the Court to settle two questions of significant import for the many thousands of federal defendants who remain incarcerated under prison terms imposed to punish conduct never proved beyond a reasonable doubt. *See* Sup. Ct. R. 10(c).

The first is whether the circuit courts have erroneously imported the test enunciated in *Teague v. Lane*, 489 U.S. 288 (1989), to define the scope of relief available on motions under § 2255. This Court has indicated that *Teague*'s application under § 2255 is unresolved. In extending *Teague*, the circuits have adopted an approach that contravenes the text of § 2255, which provides for relief by "motion" incident to the underlying criminal proceeding, rather than by proceedings in habeas corpus. Moreover, holdings extending *Teague* rest on a distorted balancing of the interests bearing on retroactivity analysis, particularly as implicated by claims that federal sentences are infected with *Booker* error. Unlike errors underlying a state judgment of conviction, error in a federal sentencing proceeding may be corrected without offense to interests in comity or federalism. Nor, in light of the broad sentencing discretion vested in district courts by

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[3] Mr. Soto conceded that *Guzman* controlled the issue in the Second Circuit. In his submission to the court of appeals, he preserved for purposes of *certiorari* review his contention that "contrary to *Guzman*, the rule in *Booker* is retroactively applicable to his case and that his petition was therefore timely filed under § 2255 [para. 6](3)." Pet'r-Appellant's Resp. to Govt's Mot. for Summ. Affirm. at 2-3, Second Circuit Case No. 07-0950 (Mar. 27, 2007).

Booker, do claims of error under the rule it announced intrude more than minimally upon the finality of sentences.

The second question on which Mr. Soto seeks review is essentially the one on which this Court granted *certiorari* in *Burton* but could not reach for jurisdictional reasons: whether, if *Teague* does apply, *Booker*, like other decisions extending the requirement that criminal culpability be proved beyond a reasonable doubt, announced a watershed rule of criminal procedure.

I. *TEAGUE*'S NONRETROACTIVITY PRINCIPLE DOES NOT LIMIT THE AVAILABILITY OF RELIEF UNDER § 2255

Teague announced a "nonretroactivity principle" that "acts as a limitation on the power of federal courts to grant habeas corpus relief to ... state prisoner[s].... [T]he *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (citation omitted). The "function of *Teague*'s ... standard is to distinguish those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee." *Id.* at 423 (Souter, J., dissenting).

Teague's acute concern with interests of federalism and comity has prompted the Court to recognize an open question as to whether the decision limits the availability of relief under § 2255. Justice Brennan, dissenting in *Teague*, expressly noted the plurality opinion's reservation of the issue. *Teague*, 489 U.S. at 327. Roughly a decade later, in *Bousley v. United States*, 523 U.S. 614 (1998), the Court declined to apply *Teague* in a § 2255 proceeding after

pausing to acknowledge that an *amicus curiae* had "urge[d]" such application. *Id.* at 619.[4]

Commentators as well have highlighted questions of *Teague*'s application under § 2255. *See* Douglas A. Berman, *When Will SCOTUS Address* Booker *Retroactivity?, published via web log, Sentencing Law and Policy*, http://sentencing.typepad.com/sentencing_law_and_policy/2007/05/when_will_scotu.html (May 16, 2007); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 25.6 at 1109-1113 & nn.14, 18-19 (4th ed. 2001); Nicholas J. Eichenseer, Comment, *Retroactivity in the Rear-View Mirror: The Case for* Blakely-Booker *Retroactivity in the Federal System*, 2005 Wis. L. Rev. 1137, 1167-69.

The Court has not subsequently revisited the issue. *See, e.g., Dodd v. United States*, 545 U.S. 353, 358 (2005) (declining to reach question of retroactivity because § 2255 motion was untimely due to defendant's failure to seek relief within one year of "date on which the right asserted was initially recognized by the Supreme Court"). Last term, however, the Court granted *certiorari* to review another question regarding *Teague*'s proper scope, namely, whether state courts may direct that new rules of federal law be given broader application than provided under *Teague*. *See Danforth v. Minnesota*, Case No. 06-8273 (*cert. granted* May 21, 2007), *decision below at* 718 N.W.2d 451 (Minn. 2006).

Mr. Soto's petition presents an excellent opportunity to examine the intersection of *Teague* and § 2255. Under the applicable limitations provision, a § 2255 motion is timely if: (1) it "assert[s]" a right within one year of the date that right

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[4] The Court's opinion in *Bousley* explained that *Teague*, "by its terms," was inapplicable because the § 2255 movant sought the benefit of a "decision[] of this Court holding that a substantive federal criminal statute does not reach certain conduct." 523 U.S. at 620.

"was initially recognized by the Supreme Court," *Dodd*, 545 U.S. at 358; (2) the right was "newly recognized by the Supreme Court," § 2255 para. 6(3); and (3) the right is "made retroactively applicable to cases on collateral review," *id.*

Mr. Soto brought his motion asserting *Booker* error well within one year of the *Booker* decision, but was deemed out of time under Second Circuit precedent holding that *Booker* is not to be given retroactive effect. In this posture, the case permits the Court to review the recurring question of whether *Teague* controls the construction of the phrase "made retroactively applicable to cases on collateral review" in § 2255 para. 6(3) or otherwise limits the availability of relief on motions under the statute.

Should Mr. Soto's motion be held timely, the matter should be remanded for the district court to determine whether his sentence was, as asserted, infected by *Booker* error and, if so, whether and how to remedy that infirmity.

A. Section 2255 Motions Do Not Sound in Habeas Corpus and Accordingly are Outside the Scope of *Teague*

Properly interpreted, the text of § 2255 indicates that federal defendants who seek to correct sentence may do so by further proceedings incident to the original criminal prosecution, without resort to habeas corpus. Because *Teague* limits retroactive application of new rules only in "collateral" proceedings, 489 U.S. at 310, the test it establishes should not be held to apply to motions under § 2255.

1. The Statutory Text, as Underscored by Its Legislative History and Remedial Structure, Distinguishes § 2255 From Habeas Corpus

Despite some similarities, § 2255 is not merely a codification of habeas corpus for federal defendants. The statute directs defendants to proceed by "motion." § 2255 paras. 2, 3, 4, 7, 8. The provision also expressly distinguishes

its motion remedy from the Great Writ. *See* § 2255 para. 5; *see also United States v. Hayman*, 342 U.S. 205, 220 (1952) ("This [§ 2255 motion] is not a habeas corpus proceeding.") In contrast, 28 U.S.C. § 2254 describes the relief available to state prisoners by application for a "writ of habeas corpus," *e.g.*, § 2254(a), without contemplation of any proceeding on "motion."

Across the range of federal practice, a "motion" means a request lodged within a previously commenced proceeding. *Compare, e.g.,* Criminal Procedure Rule 7(a) (defining "indictment" as means by which felony offense "must be prosecuted" absent waiver) *with id.* Rule 47 (providing for "motion" as means of applying "to the court for an order"); Civil Procedure Rule 3 (requiring that civil action be commenced by "complaint") *with id.* Rule 7(a), (b) (distinguishing complaints from motions); Appellate Procedure Rule 3(a)(1) (requiring that appeal of right be taken by "notice"), *and id.* at Rule 5(a)(1) (requiring that request for permissive appeal be made by "petition") *and id.* at Rule 21(a) (requiring that extraordinary writs be sought by "petition") *with id.* at Rule 27 (authorizing motions as means to apply "for an order or other relief"); Supreme Court Rules 12.1 *and* 17.2 *and* 18.1 (forms of review sought via "petition" or "notice") *with id.* Rule 21.2(a), (b) (addressing relief available on "motion"); *see also* Section 2254 Rule 2(d) (prescribing form of "petition" for writ of habeas corpus brought by state prisoner).

Consistent with the statutory text, the legislative history of § 2255 expressly states that the "motion remedy is in the criminal proceeding." S. Rep. No. 80-1526 at 2 (1948). Congress also expressly characterized § 2255 as "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus," H.R. Rep. 80-308, App. at A180 (1947), and enumerated certain advantages of the

"motion remedy over the present habeas corpus," S. Rep. No. 80-1526 at 2.

In 1976, Congress adopted the Rules Governing Section 2255 Proceedings. *See* Pub. L. No. 94-426, 90 Stat. 1334. The advisory committee note promulgated in connection with the rulemaking process reiterated that "a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action." Section 2255 Rule 1 advisory committee's note (citing legislative history of § 2255).

These remarks in the legislative and rulemaking history were not idle asides. To the contrary, the breadth of remedial powers afforded by § 2255 is contingent on the motion's character as an incident of the underlying criminal proceeding. In effect, the court exercises its "original jurisdiction ... of all offenses against the laws of the United States." 18 U.S.C. § 3231. It may "correct the sentence," § 2255 para. 2, when, for example, *Booker* error causes a term of incarceration to be fixed at a longer duration than authorized by the jury's findings. By contrast, the core of habeas corpus jurisdiction is the judicial authority to examine the legality of custody. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (identifying "challenges to present physical confinement" as "core challenges"). As a result, the essential remedial power associated with the Great Writ is that of compelling a prisoner's release, *e.g., In re Medley*, 134 U.S. 160, 173 (1890), with such release often conditioned on the State's failure to retry the petitioner within a designated period of time, *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Federal habeas jurisdiction has never functioned to permit a federal court simply to adjust a sentence imposed by a state court, authorizing instead only the cruder remedy of voiding a sentence entirely. *Solem v. Helm*, 463 U.S. 277, 284, 303 (1983); *In re Bonner*, 151 U.S. 242, 259, 262 (1894); *Moore v. Anderson*, 222 F.3d 280, 286 (7th Cir. 2000).

Like its statutory text, legislative history, and remedial breadth, § 2255's rules of practice distinguish the motion remedy from the Great Writ. A prisoner must "move the court which imposed" the sentence, § 2255 para. 1, rather than, as in habeas corpus proceedings, a court with jurisdiction over the prisoner's warden, *see Padilla*, 542 U.S. at 442. Ordinarily the clerk must, as occurred in Mr. Soto's case, "promptly forward the motion to the judge who conducted the trial and imposed sentence." Section 2255 Rule 4. Moreover, as the United States is already the "movant's adversary of record," a federal defendant need not name any respondent. *See* Rule 2 advisory committee's note. Similarly, a movant need not pay any new filing fee. *See* Rule 3 advisory committee's note.

2. Circuit Court Authority Holding Teague *Applicable Under § 2255 Is Not Persuasive*

Several courts of appeals have held that *Teague* applies to motions under § 2255. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 & nn.9-11 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1193-94 (10th Cir. 2001) (en banc); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *Van Daalwyk v. United States*, 21 F.3d 179, 181-83 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 94-95 (2d Cir. 1990). None of these cases considered a non-successive § 2255 motion, like Mr. Soto's, that challenged only sentence. Nor did these opinions address § 2255's text, history, remedial breadth, or rules of practice. Instead, while acknowledging that *Teague* expressly considered only state judgments of conviction, the courts presumed an identical interest in finality to inform post-conviction review in the federal context, and reasoned that any failure to extend *Teague* would therefore give rise to unwarranted disparities between federal and state prisoners.

This rationale is not persuasive. As further discussed in Part I.B.2, the interest in finality exerts less force in federal

post-conviction review of federal prosecutions than it does in federal court review of state convictions, and it is particularly attenuated when a federal defendant challenges only sentence. Indeed, as explained below, the interest is weakest when a sentencing challenge turns on the novel discretion that *Booker* vested in district courts.

The circuit courts' concern for disparity in federal court review of challenges by federal as distinct from state prisoners is also misplaced, because it neglects Congress's enactment of different standards to govern post-conviction proceedings in each context. The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), expressly limited state prisoners to challenges of "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* AEDPA § 104, 110 Stat. at 1219, *codified at* 28 U.S.C. § 2254(d)(1); *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006). Federal defendants, by contrast, proceed under a statute that plainly does not limit review to the precedent of this Court. *See* § 2255 para. 1. Similarly, with respect to state prisoners' habeas petitions, AEDPA mandated deference to state courts' findings of fact and prescribed a new, heightened standard that must be satisfied before evidence will be heard. *See* AEDPA § 104, 110 Stat. at 1219, *codified at* 28 U.S.C. § 2254(e). No like restriction limits federal defendants who return to the sentencing court to seek further hearing. *See* § 2255 para. 2; *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring).

In sum, the weakened interest in finality implicated by *Booker* challenges to federal sentence, as described more fully below, along with Congress's enactment of limitations unique to federal habeas review of state convictions, together displace the rationale on which the circuit courts have relied in presuming *Teague* to apply under § 2255. As a matter of

law, § 2255's text, its history, and its structure, as evinced by the availability of remedies foreign to habeas corpus and rules delineating a motion-based practice, all demonstrate that the motion brought by Mr. Soto is a continuation of his original criminal case, not a separate proceeding in habeas corpus. For these reasons, the Court should issue a writ of *certiorari* to determine whether *Teague*'s habeas corpus rule defines the meaning of "retroactively" as used in § 2255 para. 6(3) or otherwise restricts the availability of relief under the statute.

B. The Range of Interests Properly Informing Retroactivity Analysis Militates Against Extension of *Teague*'s Nonretroactivity Principle to § 2255 Motions, Particularly When *Booker* Error Is Asserted

Mr. Soto's petition presents the Court with an opportunity to address the proper balancing of the interests informing retroactivity analysis when a federal defendant moves under § 2255 to correct a sentence on the basis of asserted *Booker* error. In this context, the concerns of federalism and comity safeguarded by *Teague* are wholly absent, and the interest in finality is of substantially diminished significance.

1. Proceedings Under § 2255 Do Not Implicate Teague*'s Core Federalism Concerns*

The plurality in *Teague* distilled the rationale essential to its ruling as follows:

> The costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in

> prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore ... [s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.

Teague, 489 U.S. at 310 (emphasis in original; citations omitted).

In the years since *Teague*, this Court has elaborated upon the gravity of the threat posed to the federal-state balance by unsound exercise of federal habeas jurisdiction to review state court convictions. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Accordingly, federal habeas doctrine has of necessity been informed not merely by "standards of general application," but also by "jurisprudential limits" peculiar to the extraordinary interests implicated by collateral attack upon "a criminal judgment entered in state court." *Id.* at 553.

The "foremost" purpose served by federal habeas jurisdiction is "ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). "In order to perform this deterrence function, ... the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306. Indeed, it *must* apply only such standards if state jurists are to perceive issuance of the writ as meaningful censure for failing to uphold the Constitution. *See Banks*, 542 U.S. at 423 (Souter, J., dissenting). *Teague* therefore "validates reasonable, good-faith interpretations of existing precedents made by state

courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

Unlike habeas corpus, proceedings under § 2255 do not require the careful calibration of checks and balances essential to the dual sovereignty established under the Constitution's federalist structure. Rather, the conviction or sentence under review was rendered not merely by a federal rather than a state court, but by the *very same* federal court, and typically by the very same federal *judge*, that presided over the original proceedings. It can hardly be said in this context that there is need of any special "limitation on the power of federal courts," nor of attention to a "delicate state-federal relationship." No deterrent function need be ensured — nor would be served — by limiting review to the questions of law already decided by the judge who sentenced the defendant. As one federal jurist has recently put it, in an opinion considering *Booker*'s retroactivity:

> In a section 2255 case ... where comity and federalism are irrelevant, there is much less need to defer to the divergent views of federal judges who, in hindsight, did not correctly apply existing precedent to a new case. We are, after all, members of inferior courts established by the same sovereign (unlike state court judges), and if the Supreme Court says we were wrong, we should take our medicine and gladly apply the correct rule retroactively....

Valentine v. United States, 488 F.3d 325, 343 (6th Cir. 2007) (Martin, J., dissenting).

2. The Interest in Finality Is Not Pronounced in the § 2255 Context, Particularly When Defendants Assert Sentencing Error Under Booker

The absence of federalism and comity interests in the § 2255 context leaves as *Teague*'s remaining rationale "the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. While this concern may not be wholly absent when a defendant seeks to correct sentence via § 2255, it is considerably muted.

The Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003), illuminates the general point. There, the Court held that a defendant's failure to raise an ineffective assistance of counsel claim on appeal does not preclude that claim's subsequent assertion by motion under § 2255. *Id.* at 504. The Court reasoned that the procedural-default doctrine — generally "adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments," *id.* — should give way because the district court is the "forum best suited to developing the facts necessary to determining the adequacy of representation," *id.* at 505. *Massaro* thus stands for the proposition that, in the § 2255 context, the law's interest in finality should yield when adjudication in the district court offers plain practical advantages. The same cannot be said in the context of federal habeas corpus, in which federal courts have continued to apply the procedural-default doctrine inflexibly. *See Gomez v. Jaimet*, 350 F.3d 673, 678 (7th Cir. 2003) (recognizing that state prisoners have no right under *Massaro* to wait until conclusion of direct appeal before raising ineffective assistance claims); *see also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006) (confirming *Massaro*'s reliance on distinction between state and federal prisoners).

Like the factual findings considered in *Massaro*, assertions of *Booker* error are best addressed by the sentencing court. Because an appellate court generally will

not "know what the sentence would have been absent the error," the best solution is to "ask the sentencing judge." *United States v. Williams*, 399 F.3d 450, 458-59 (2d Cir. 2005) (Newman, J.); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Ameline*, 409 F.3d 1073, 1079, 1081 n.4 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 770 (D.C. Cir. 2005) (per curiam). Like the questions of fact essential to claims of ineffective assistance of counsel, the matters of discretion essential to claims of *Booker* error give the district court a comparative institutional advantage. For this reason, assertions of *Booker* error may be addressed most expeditiously under § 2255.

Moreover, unlike the claim of ineffective assistance of counsel considered in *Massaro*, error under *Booker* will never scuttle a jury verdict. Nor will its rule — that "any fact that exposes a defendant to a greater potential sentence must be ... established beyond a reasonable doubt," *Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) — ever require a court to revisit the defendant's guilt or innocence. State courts and legislatures, in developing procedures for challenges exclusively to sentence, have commonly taken account of the delimited inquiry such claims require by permitting them to be raised at any time. *See, e.g.*, Fla. R. Crim. P. 3.800; Iowa R. Crim. P. 2.24(5)(a); *State v. Murray*, 162 N.J. 240, 247 (N.J. 2000); N.Y. Crim. Proc. Law § 440.20(1); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005); Utah R. Crim. P. 22(e); *Dargan v. Commonwealth*, 500 S.E.2d 228, 229 (Va. Ct. App. 1998). So too should federal courts relax otherwise applicable limitations on post-conviction review when assessing challenges exclusively to sentence.

Booker's intrusion upon finality is also minimized by the limited corrective remedy to be applied. A defendant will not be entitled to resentencing unless the district court would

have imposed a different sentence in the exercise of its discretionary authority. *Booker*, 543 U.S. at 267-68; *United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005) (Newman, J.); *Paladino*, 401 F.3d at 484 (7th Cir.) (Posner, J.); *Ameline*, 409 F.3d at 1081 (9th Cir) (en banc); *Coles*, 403 F.3d at 770-71 (D.C. Cir.) (per curiam). In many instances, it will be possible for a court to ascertain whether resentencing is necessary simply by considering the existing record in light of the factors enumerated in 18 U.S.C. § 3553(a). No submission need be required from the government, *see* § 2255 para. 2, no evidence need be heard, *see id.*, *and see* Section 2255 Rule 8(a), and no defendant need be produced, *see* Fed. R. Crim. P. 43(b)(3), *Crosby*, 397 F.3d at 120. The record may already include an express pronouncement of the sentence that would have been imposed in the exercise of discretion. *See United States v. Hammoud*, 81 F.3d 316, 354 (4th Cir. 2004) (en banc) (recommending prior to *Booker* that district courts "announce, at the time of imposing a guidelines sentence, a sentence pursuant to 18 U.S.C.A. § 3553(a), treating the guidelines as advisory only"), *vacated and remanded for reconsideration in light of* Booker, 125 S. Ct. 1051 (2005); *Paladino*, 401 F.3d at 482 (7th Cir.) (Posner, J.) (contemplating same).

Notably, in Mr. Soto's own case, the sentencing judge's grant of a certificate of appealability and appointment of counsel, notwithstanding the Second Circuit's clearly controlling *Guzman* precedent, provide strong indication of that court's inclination to grant discretionary relief to the extent permitted by law.

In sum, there is substantial authority and reason to conclude that finality does not militate as heavily against retroactivity in the context of § 2255 motions as it does in

habeas corpus, particularly with respect to the correction of *Booker* error.[5]

3. Teague *Undermines a Sound Conception of the Judicial Role and Squanders Judicial Resources*

Substantial interests militate against extension of the *Teague* retroactivity test to motions under § 2255. First, *Teague* requires a departure from the traditional judicial role, whether defined by reference to "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803), or the broader common law tradition. *See Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in two judgments and dissenting in one) (explaining that failure to apply new rules retroactively on direct review "entails an inexplicable and unjustifiable departure from the basic principle upon which rests the institution of judicial review"); *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future."). "To hold a governmental act to be unconstitutional," as in *Booker*, "is not to announce that we forbid it, but that the Constitution forbids it.... Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring). By establishing an analytical framework

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[5] It should also be recalled that any § 2255 motion asserting that a sentence violates the constitutional rule announced in *Booker* is untimely unless it was filed by January 12, 2006, *i.e.*, within one year of the decision. This Court has clearly ruled that any new decision holding *Booker* retroactive will not revive the one-year limitations period. *Dodd*, 545 U.S. at 358-59.

tending to favor non-retroactive application, *Teague* has diluted this jurisprudential principle.

A second jurisprudential concern implicated by *Teague* is the strain upon judicial resources occasioned by its fixed "order of battle" rule. Under *Teague*, a court may not dispose of a case on the ground that the rule sought to be given retroactive effect simply would not warrant relief were it applied to the merits of the case. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Nor may courts hold a rule not to be retroactive by selecting the analysis posing the fewest complexities. Instead, a habeas court must first decide whether a conviction is final; if so, it must next decide whether the right asserted arises from a new rule of constitutional law; and, if so, only then may the court finally reach the question of whether the rule is retroactive. *Banks*, 542 U.S. at 411. Yet the determination of whether a procedural rule is "new" has commonly proved difficult, *e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997); *Stringer v. Black*, 503 U.S. 222, 228-237 (1992); *Penry v. Lynaugh*, 492 U.S. 302, 313-19 (1989), whereas the question of retroactivity may lend itself more frequently to summary analysis.

Members of this Court have expressed persistent discomfort with "rigid order of battle" rules suspected to engender inefficiencies akin to those created by *Teague*. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1774 n.4 (2007) (citation omitted) (inviting reconsideration of requirement under *Saucier v. Katz*, 533 U.S. 194, 201 (2001), that courts applying doctrine of qualified immunity first determine whether constitutional right was violated before asking whether right was "clearly established"); *see also id.* at 16 (Ginsburg, J., concurring); *id.* at 18 (Breyer, J., concurring); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and in judgment); *see also Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*,

127 S. Ct. 1184, 1194 (2007). The utility of fixed "order of battle" rules might helpfully be revisited by considering *Teague*'s application in the § 2255 context.

In sum, the constellation of interests implicated by the question of whether *Teague* governs motions under § 2255 presents an opportunity for this Court to devise a sound retroactivity jurisprudence in a context whose vital significance is apparent on recalling that it "is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person." *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006). The absence of federalism or comity concerns, the diminished significance of finality both as a general proposition and in the specific context of *Booker*, the proper role of the American judiciary, and the opportunity to conserve judicial resources all favor the fashioning of a distinct retroactivity standard.

II. *BOOKER* ANNOUNCED A 'WATERSHED' RULE OF CRIMINAL PROCEDURE WITHIN THE MEANING OF *TEAGUE*

Should the Court extend *Teague* to limit the relief available under § 2255, it should grant *certiorari* to review the court of appeals' determination that *Booker* did not announce a "watershed rule of criminal procedure."

As the district court found, App. 3a to 4a, it is evident that this question merits the Court's attention in light of the issuance last term, *see Burton*, 127 S. Ct. at 794, of a writ of *certiorari* to consider the retroactivity of the rule announced in *Blakely v. Washington*. In *Burton*, the petitioner focused, as here, on the requirement of proof beyond a reasonable doubt rather than the freestanding requirement that facts essential to sentence be found by a jury. For jurisdictional reasons, however, the Court was unable to reach the question on which it granted *certiorari*. *Burton*, 127 S. Ct. at 796. Mr. Soto's petition now presents an opportunity to decide it.

A. The Failure to Find Sentencing Facts By Proof Beyond A Reasonable Doubt Substantially Diminishes Accuracy and Neglects a Bedrock Element of Fairness

A watershed rule is one that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993). To qualify, a rule must meet two requirements: its infringement must "seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). *Booker*'s extension of the requirement of proof beyond a reasonable doubt to federal sentencing proceedings should be held to meet this definition.

The Court has previously directed that the requirement of proof beyond a reasonable doubt is so essential to the right of fair trial as to require "complete retroactive effect." *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977); *see also United States v. Johnson*, 457 U.S. 537, 544 (1982). Failure to uphold the reasonable doubt standard "substantially impairs [the criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts." *Hankerson*, 432 U.S. at 243. As a "prime instrument for reducing the risk of ... factual error," the requirement of proof beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship*, 397 U.S. 358, 363-64 (1970).

Even more fundamentally, the reasonable doubt standard "provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

The dual functions served by the standard make clear that its novel application in federal sentencing proceedings necessarily implicates both "accuracy" and "fundamental fairness" within the meaning of the watershed rule exception. As the standard is a "prime instrument for reducing the risk of ... factual error" and, conversely, as the rule's neglect "substantially impairs" the truth-finding function, it is clear that the requirement of proof beyond a reasonable doubt satisfies the first element of the definition of a "watershed" rule, namely, that its infringement "seriously diminish[es] the likelihood" of an accurate determination of culpability.

Moreover, the novel application of a "bedrock axiomatic and elementary principle," *Winship*, 397 U.S. at 363, satisfies the second "watershed" element, requiring that the new rule "alter our understanding of the bedrock procedural elements" of a fair federal sentencing hearing. *Booker*'s essential contribution to fundamental fairness has found expression in the exercise of discretion by numerous courts of appeals to correct unpreserved *Booker* error that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Oliver*, 397 F.3d 369, 378 (6th Cir. 2005); *see also United States v. Antonakopoulos*, 399 F.3d 68, 81-82 (1st Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 119 (2d Cir. 2005) (Newman, J.); *United States v. Hughes*, 396 F.3d 375, 381 n.8 (4th Cir. 2005) (Wilkins, C.J.); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Ameline*, 409 F.3d 1073, 1079, 1081 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 767 (D.C. Cir. 2005) (per curiam).

Consonant with the reasonable doubt standard's watershed quality, this Court and the circuits have repeatedly held, as in *Hankerson*, that new rules giving effect to the standard must be applied retroactively after the conclusion of direct appeal. *Ivan V. v. City of New York*, 407 U.S. 203, 205

(1972); *United States v. Montalvo*, 331 F.3d 1052, 1055-56 (9th Cir. 2003) (considering rule announced in *Richardson v. United States*, 526 U.S. 813 (1999)); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002) (same); *Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir. 2001) (same); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir. 2001) (same); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (same); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (same); *Gaines v. Kelly*, 202 F.3d 598, 605 (2d Cir. 2000) (considering rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990)); *West v. Vaughn*, 204 F.3d 53, 61-63 (3d Cir. 2000) (same), *overruled on other ground*, *Tyler v. Cain*, 533 U.S. 656, 661-62 (2001); *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir. 2000) (considering rule of *Cage*); *Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (en banc) (same); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (same); *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (same); *Hall v. Kelso*, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (considering rule announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307 (1985)).[6]

This Court has also held that a failure to give proper effect to the reasonable doubt standard is "structural error" necessarily invalidating any conviction. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993). Because the definition of structural error, *see Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), is congruent with the definition of a watershed rule, *Sullivan* directs that any new rule extending the reasonable doubt standard falls within the *Teague* exception. *See Tyler v. Cain*, 533 U.S. at 671-74 (Breyer, J.,

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[6] The cited cases involved application of a variety of retroactivity tests, including the watershed rule exception, the exception for new substantive rules, and a pre-*Teague* standard.

dissenting) (identifying congruence); *id.* at 666-67 & n.7 (opinion of the Court).[7]

B. Circuit Court Decisions Holding *Booker* Not To Be Retroactive Rest Upon Erroneous Analyses

At odds with the reasonable doubt standard's place at the "foundation of the administration of our criminal law," *Winship*, 397 U.S. at 363, the circuit courts have not recognized the watershed character of *Booker*'s requirement that facts exposing a defendant to enhancement under the mandatory Guidelines had to be proved beyond a reasonable doubt, *see Cunningham*, 127 S. Ct. at 863-64. The circuit consensus has resulted from a failure to come to terms with the reasonable doubt standard's essential role in promoting accuracy and fairness.

Several courts have failed to distinguish between *Booker*'s requirement of proof beyond a reasonable doubt and its separate requirement that sentence-enhancing facts be found by a jury. These courts have then erroneously treated *Schriro v. Summerlin*, 542 U.S. 348 (2004), as controlling. *See Humphress v. United States*, 398 F.3d 855, 863 (6th Cir.), *cert. denied*, 546 U.S. 885 (2005); *United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005), *cert. denied*, 546 U.S. 1155 (2006); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir.), *cert. denied*, 546 U.S. 924 (2005). In *Summerlin*,

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[7] *Washington v. Recuenco*, 126 S. Ct. 2546 (2006), is not to the contrary. There, the Court held that no structural error undermined a sentence enhanced for use of a firearm when a jury had determined, beyond a reasonable doubt, that the defendant used a "deadly weapon." *Id.* at 2549. Because the only "deadly weapon" as to which the prosecution introduced evidence was a firearm, *id.* (quoting charging instrument and describing State's case), the judge was not required to find any fact in order to impose the enhancement. Rather, all that was required was construction of the jury's verdict in light of a record that dictated, as a matter of logic, one and only one reading. In other words, there was no *Blakely* error — structural or otherwise.

however, this Court had no occasion to consider the reasonable doubt standard extended in *Booker*, because the case addressed a state capital sentencing scheme that had always required sentencing facts to be proved beyond a reasonable doubt. *Id.* at 353 (noting that rule sought to be given retroactive effect, announced in *Ring v. Arizona*, 536 U.S. 584 (2002), "rested entirely on the Sixth Amendment's jury-trial guarantee").[8] While the same jury trial right was also one aspect of *Booker*'s holding, the Guidelines differed from the scheme considered in *Summerlin* in that the Guidelines provided for mandatory enhancement on the basis of facts proved by a simple preponderance rather than beyond a reasonable doubt.

Another misapprehension on the part of at least one court is the view that determinations of culpability do not implicate the concerns of accuracy and fairness that inform determinations of guilt. *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005). That reasoning conflicts with the precedent of this Court, which has held that the Due Process Clause requires proof beyond a reasonable doubt of facts essential "not only [to] guilt or innocence ... but also [to] the degree of criminal culpability." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). The *Summerlin* decision confirms the error of this line of analysis. *See Lloyd v. United States*, 407 F.3d 608, 614-15 (3d Cir.), *cert. denied*, 546 U.S. 916 (2005) (explaining why "*Summerlin* leaves little doubt that the 'watershed rule' exception can apply to a procedural rule that only affects sentencing").

Most relevant to Mr. Soto's motion is a third error evident in the Second Circuit precedent under which he was deemed out of time, as well as in the precedents of at least four other courts of appeals. *See Lloyd*, 407 F.3d at 615; *United States*

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[8] The requirement of proof beyond a reasonable doubt "is prescribed by the Due Process Clause." *Sullivan*, 508 U.S. at 277.

v. Morris, 429 F.3d 65, 72 (4th Cir. 2005), *cert. denied*, 127 S. Ct. 121 (2006); *United States v. Gentry*, 432 F.3d 600, 605 (5th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir.), *cert. denied*, 545 U.S. 1110 (2005). These decisions erroneously treat the question of *Booker* retroactivity exclusively by reference to the *remedy* by which *Booker* preserved an advisory Guidelines regime. They fail to acknowledge the existence of a distinct issue as to the proper scope to be given Booker's *rule* extending the reasonable doubt standard.

Hence, the Second Circuit reasoned that "[t]he procedural defect identified in *Booker* is that sentence-enhancing factors were found by judges rather than by juries, and by a preponderance rather than beyond a reasonable doubt; but the remedy—to render the Guidelines advisory—vested greater discretion in judges, not less." *Guzman*, 404 F.3d at 143. "*Booker* did not establish a watershed rule because the only change is the degree of flexibility judges enjoy in applying the guideline system." *Id.* (citation and alteration marks omitted).

Yet the fact that the *statute*'s unconstitutionality was remedied with relative ease does not mean that unconstitutional *sentences* may be dispatched in like manner. Mr. Soto's assertion is that he was punished in violation of the rule that sentence may not be enhanced upon facts never tested against the reasonable doubt standard. It is this proscription which, if "made retroactive," renders Mr. Soto's petition timely under 28 U.S.C. § 2255 para. 6(3). *Booker*'s salvage of a substantial part of the Guidelines going forward did not cure constitutional errors that had already occurred. The Second Circuit's failure to acknowledge this distinction calls to mind this Court's recent exhortation that "*Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." *Cunningham*, 127 S. Ct. at 870; *see also id.* at 869-70 & n.15

(holding that state sentencing regime under which statutory enhancement requires judge to find facts by simple preponderance violates rule of *Booker*, even when decision to enhance is discretionary).

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* to consider the questions presented.

Dated: September 6, 2007
New York, New York

Respectfully submitted,
Paul Schoeman
Counsel of Record

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Counsel for Petitioner

E.D.N.Y.
98-cr-845
05-cv-3421
Korman, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse at 500 Pearl Street, in the City of New York, on the 13th day of July, two thousand seven,

Present:

Hon. Chester J. Straub,
Hon. Barrington D. Parker,
Hon. Richard C. Wesley,
Circuit Judges.

Filed
Jul 13 2007

HECTOR SOTO,

Petitioner-Appellant,

—v.—

07-0950-pr

UNITED STATES OF AMERICA,

Respondent-Appellee.

The Government moves for summary affirmance of the district court's order denying the Appellant's motion filed pursuant to 28 U.S.C. § 2255. Upon due consideration, it is ORDERED that the Government's motion is GRANTED. Appellant's sole argument on appeal is that *United States v. Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review. However, this Court has specifically held, in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), that *Booker* does not apply retroactively to cases on collateral review. As such, there are no non-frivolous issues on appeal, and summary affirmance is appropriate. *See United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ LUCILLE CARR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

HECTOR SOTO,

Petitioner,

MEMORANDUM
AND ORDER
05-CV-3421(ERK)

—against—

UNITED STATES OF AMERICA,

Respondent.

Korman, Ch. J.

The petition for a writ of habeas corpus is denied on the ground that it was not timely filed. The exception to the one year period of limitation contained in 28 U.S.C. § 2255 for claims asserting "a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" does not save the petition from dismissal. Specifically, in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), the Second Circuit explicitly held that *Booker* is not retroactively applicable to cases on collateral review. While the Supreme Court granted a petition for a writ of *certiorari* to consider the issue in a case in which the Ninth Circuit reached the same conclusion, it ultimately resolved the case on the ground that the district court lacked juris-

diction to entertain the petition (the second one filed by petitioner), because he did not obtain an order authorizing him to file it. *Burton v. Stewart*, 127 S.Ct. 793 (2007).

The issue whether to grant a certificate of appealability is a difficult question. On the one hand, the issue has been resolved adversely to petitioner by the Second Circuit. On the other hand, the Supreme Court concluded in *Burton v. Stewart* that the issue is worthy of Supreme Court review. Under these circumstances, the appropriate course seems to me to appoint counsel and grant a certificate of appealability.

The United States Attorney, perhaps without objection by petitioner (other than a caveat preserving the issue), can move for a summary affirmance and petitioner can then seek a petition for a writ of *certiorari*.

Conclusion

The petition is denied. I appoint Paul Schoeman, Esq., Kramer, Levin, 1177 Avenue of the Americas, New York, NY 10036, to represent petitioner and I grant a certificate of appealability.

Brooklyn, New York
March 6, 2007

SO ORDERED:

/s/ EDWARD R. KORMAN
Edward R. Korman
United States Chief District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA 98-CR-845 (ERK)

—v.— October 22, 1999
Brooklyn, New York

HECTOR SOTO,
Defendant.

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH, ESQ.
UNITED STATES ATTORNEY
BY: JILL FEENEY, ESQ.
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Brooklyn, New York 11201

For the Defendant: JORGE SANTOS, ESQ.

Audio Operator: LOURDES VAZQUEZ

Court Transcriber: LINDA FERRARA
TypeWrite Word
Processing Service
356 Eltingville Boulevard
Staten Island, New York 10312

Proceedings recorded by electronic sound recording, transcript produced by transcription service

THE CLERK: *The United States of America v. Hector Soto*. Would counsel please note their appearances for the record.

MR. SANTOS: On behalf of —

MS. FEENEY: Go ahead.

MR. SANTOS: On behalf of Mr. Soto, Jorge Santos, 118-35 Queens Boulevard. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. FEENEY: Jill Feeney and Pam Chen for the Government. Good afternoon.

THE COURT: Good afternoon.

MR. SANTOS: Judge, my client wishes to sit down at the defense table. He's a little bit nervous.

THE COURT: He could sit down closer to you. Pull up a chair right next to you. All right, Mr. Soto, have you had an opportunity to read the Presentence Report?

THE DEFENDANT: Yes, sir.

[Pause in proceedings.]

THE DEFENDANT: Yes, sir, I have.

MR. SANTOS. Judge, before we continue, I just want to clear up one matter. I believe, Your Honor, I faxed over and I also mailed to Your Honor my letter to you regarding the sentencing of my client.

THE COURT: Yes.

MR. SANTOS: Also, there have been two letters that were faxed over to your chambers; one from my client's former employer and co-worker that were dated some time last week but I actually received them on Tuesday of this week.

THE COURT: I have one from a Mr. Thomas Woods.

MR. SANTOS: Okay and I have one from —

THE COURT: And I have another —

MR. SANTOS: — Philip Sanchez. I don't know if Your Honor wants to read it.

THE COURT: I don't —

MR. SANTOS: But I would rather read it for the record.

THE COURT: All right. Is this it? I can't read the handwriting. Is this it?

MR. SANTOS: That's it.

THE COURT: Yes.

MR. SANTOS: Yes, Judge.

THE COURT: I can read his handwriting.

MR. SANTOS: Okay.

THE COURT: But I couldn't read his signature.

MR. SANTOS: Okay.

THE COURT: Because he does actually say in the last paragraph in writing that I can read —

MR. SANTOS: Just so, Your Honor —

THE COURT: — what his name is.

MR. SANTOS: So, Your Honor did receive the letters?

THE COURT: Yes.

MR. SANTOS: And read them?

THE COURT: Yes.

MR. SANTOS: Very good. Okay, let me just read the letter that Your Honor received yesterday from my office. it's a five-page letter from — excuse me, a four-page letter from Phil Sanchez, which was my client's supervisor at the time that he was employed by the Border — United States Border Patrol. It starts off October 5, 1999, Page 1.

"I first encountered Hector Soto during the beginning months of 1996. He had been released from the Field Training United of the Los Gallos Arizona Border Patrol Station. He had volunteered to work the permanent midnight shift. I was a supervisor assigned to that shift. I was Hector's first time supervisor for the remainder of 1996, all of 1997 and until March 31, 1998.

"At that time, there was a unit shake-up and Hector went to the Flex Unit. I was Hector's rating supervisor for the rating year April 1, 1997 through March 31, 1998. Hector earned an overall rating of excellent for that year. My first impression of Hector was that he was a mild mannered, quiet type. He was a hard worker and would follow orders pretty well. I did have to counsel him a few times for unsafe practices.

"On one occasion, he had actually turned his hand held radio off and approximately twenty to thirty aliens were seen on a night scope running right past them. He never saw them. On several occasions he was yelled by me for leaving his assignment area without permission.

"Any time another agent would call for help, Hector would respond. It didn't matter how far away the call for help came from, Hector would go. At that time, we were apprehending up to three hundred undocumented aliens per shift with from twelve to eighteen agents. I had to keep tight control over my people for officer's safety reasons. I had to know who was where and what they were doing at all times.

was impossible to hide from me and if you weren't where you were supposed to be there, there would be hell to pay. I remember screaming at Hector so loud that I would accidently have spit fly out of my mouth on to him. He would just keep that calm look on his face and very politely tell me that he understood what I was just — by what I had just barked. Hector very quickly learned to inform me of all of his movements out of his area and he did from them on.

"As I did — as I said, Hector was always the first one to respond to fellow agents in distress. On one occasion, Agent Greg Widner, W-I-D-N-E-R, was a —"

THE DEFENDANT: Winder.

MR. SANTOS: Excuse me?

THE DEFENDANT: Widner.

MR. SANTOS: Winder. "Was attempting to apprehend a group of five suspected bandits in the Grand Avenue tunnel entrance. This tunnel goes underground directly from Mexico and at that time, was always filled with glue sniffing, paint sniffing bandits who preyed off the hundreds of undocumented aliens trying to enter the United States.

"Anyway, these five suspected bandits attempted to assault Agent Widner. Agent Soto, immediately upon arrival jumped into the tunnel entrance and put an immediate end to the confrontation. In that incident, Agent Widner was intentionally bitten by one of the suspects who later claimed to have AIDS.

"On another occasion he was — it was reported to me that aliens were being robbed at knife point and that a woman was being raped at knife point inside the same tunnel system described earlier. It is our policy that management cannot order an agent into the tunnel because of

the extreme danger within. Aside from the bandits, this tunnel was — which comes directly from Mexico," — there's a little typo there, Judge — "carries raw sewage and has been tested positive for diseases, many diseases.

"As I proceed to the tunnel entrance to enter alone, Agent Hector Soto arrived at my location. He volunteered to enter the tunnel with me. The two of us waded through approximately three and a quarter mile foot deep raw sewage in total darkness. Hector did this with little or no regard for his own safety. He continually put his life on the line for all of us. We never did find the rape victim.

"I have seen Agent Soto interacting with apprehended aliens in a very soft spoken professional manner. I've seen him hold their babies as if they were his own. I've seen him helping old ladies into and out of border patrol vehicles. I've seen him playing with the children, helping them to relax during some very, stressful times. I've also seen Agent Soto chase down and apprehend aliens and narcotics smugglers and bring them to justice. And always, even under stress, he would act in a noticeably professional manner. I always believed this to be a rare and valuable quality an agent.

"In conclusion, Hector Soto was a most competent and very excellent border patrol agent. I wish he were back here. I would work with him tomorrow in a heart beat. My name is Philip Sanchez. I am a supervisory patrol agent and I have been stationed in Los Gallos, Arizona since March of 1994. I've been a border patrol agent of the United States Border Patrol for twenty-one years. I swear that the aforementioned report is true and correct to the best of my knowledge and is signed Philip Sanchez and dated October 5, 1999."

I read that letter, Judge, because that was the general feeling of my client. I, myself, went to Arizona to speak

to a number of agents who the Government had interviewed regarding this case. All of them said the same thing about Hector. They were all shocked about the allegations in this case, shocked about what he was charged with doing between 1992 and 1994.

They've all called my office, some of them are a little reluctant to write letters because of their position. But all of them have been in contact with my office from the time that Mr. Soto was arrested in June of 1998.

I wrote a letter to Your Honor basically stating that Your Honor has the authority to depart from the recommended sentence that's in the Probation Report and I think that you should. And the reason, I think is obvious from these letters and also, I think, from the testimony that came out in trial from Troy Turk, another agent from Border Patrol who testified about taking Mr. Soto after a — I believe it was a funeral or some kind of a mass that was held for an agent that had been murdered in the dessert a couple of days before my client's arrest.

You also heard from Tripp Peterson, a close friend and roommate of my client's who had known my client for approximately two years and had known him from — he's known my client since July of 1996 and there were allegations made here that when my client confessed that he had told Tripp what had occurred and I put him on the stand for those purposes. And, again, I spoke to Tripp at length. You know, he wanted to know from me whether my client was guilty and we had a whole conversation about whether he was guilty or not guilty and he was a little apprehensive in coming to testify and I told him just say the truth. If he told you he did it, come in. You know, I'm not going to use you obviously for trial and I'm sure the Government would but he was honest with me and he came in and subjected himself to some pretty intense cross-examination, even though he knew that he

was going to be subjected to that intense cross-examination. We had discussed that prior to his testimony.

I mean, what else can I say? I mean, in addition to my client's job as an agent, I mean, just — his conduct as an agent, Your Honor, I think Your Honor has to recognize that. That based on what his supervisor wrote to you and also the testimony in this case that he conducted himself in an exemplary manner. He also lived his life after February of 1994, which is when the last incident happened that the Government proved in this case, he immediately got himself a job. I mean, he did this without knowing that he was under investigation. He did this without knowing that he was going to be arrested, unlike a snitch or an informant that gets arrested, has lived a life of crime up to the point of his arrest and then all of the sudden he begins to cooperate with the Government in order to get leniency from the Government or from the Court.

My client didn't do that. You know, he voluntarily, you know, changed his life from what the prosecution proved in this case and if there is somebody that deserves to be sentenced to something much less than what Probation has recommended, it's Hector Soto. I mean, he doesn't deserve to go to jail for the rest of his life.

THE COURT: It's not a recommendation. It's the guidelines.

MR. SANTOS. I understand that, Judge, but you have the authority based on the case law that I cited in my letter to depart based on extreme rehabilitation. I mean, and this is extreme rehabilitation. This is a case where a defendant rehabilitated himself and contributed to society. I think no one can deny that, not even the Government.

So, you know, hopefully Your Honor will sentence my client to something where he would be able to leave — get out of jail and live some kind of life. He does have a young daughter, a wife. He has a family who has supported him from the very beginning of this case and I hope Your Honor takes into consideration what I requested in my letter and also, what his co-workers have testified to and the letters that Your Honor received.

THE COURT: Mr. Soto, do you wish to speak before I impose sentence?

THE DEFENDANT: Yes. May I stay seated, sir?

THE COURT: Yes.

[Pause in proceedings.]

MR. SANTOS: Judge, may my client have a minute to compose himself?

THE COURT: Yes.

MR. SANTOS: Can he go in the back for five or ten minutes, Judge?

THE COURT: Yes.

MR. SANTOS: Your Honor?

THE COURT: Yes.

[Off the record.]

THE DEFENDANT: Good afternoon, Mr. Korman, ladies and gentlemen of the Courtroom. I know that I am before you today, Mr. Korman, to get sentenced. I would like to thank you, Mr. Korman, for your patience prior to, during and after my trial. I would also like tot hank my family, my wife, my daughter, my mother and my father and my brother, et cetera, for their patience, love,

support and dedication throughout these seventeen months.

Let's go back for a few minutes. Let's start with 1982 when I was ten years old when I commenced military school and graduating in 1990 at the age of eighteen. While at military school I achieved very high goals. Besides graduating and being on the Dean's list, most important goal which I achieved as being a proctor which allowed me to help other children younger than myself through many rough times, being homesick, death in the family and with classes.

By achieving a full scholarship to college to play basketball really made me believe that hard work really pays off. Transferring to St. John's University allowed me to reunited with my family to continue my education.

In 1992, me and my wife changed my life and the meaning of dedication. I asked for Maria to marry, and now my wife, to marry me in '94. My precious little girl was born in August of 1995, making us a more loving, closer family. In December of '96, Maria and I got married. We are a very loving, caring, family but this incarceration has kept us apart.

Since '94, I have been gainfully employed by numerous employers; Guess Factory Outlet, Bannister Shoes, The Department of Energy in D.C., where I dealt with secret, top secret confidential material, receiving a Q Clearance which is the most profound, enduring, background investigation that can be performed by the Government, interacting with Government personnel as high as the Department of Energy Secretary, Hazel O'Leary, later gaining employment with INS, the U.S. Border Patrol which is the most sophisticated, delicate, responsible and enjoyable employment one could ask for.

I will not go into depth about my duties, enjoyment, likes or dislikes about Border Patrol because I won't fin-

ish today. I will say that I have not only been separated from my immediate family but I've also been separated by my second family, a family unlike no other you can be a part from. A family which consists of hundreds and hundreds of true, honest loving brothers.

Prior to my arrest, I was living an exceptional life, providing love, happiness, security and a future for my family at the age of twenty-six and being where I was made me feel very proud of what I was doing; providing for my family, providing assistance to my country.

To conclude, Mr. Korman, I am twenty-seven years old. My wife is twenty-four and my beautiful daughter is four. I have stated the above because I know you must sentence me today to something. Please, Mr. Korman, allow me to have a life when you decide my sentencing. Allow me to have a life with my daughter and wife. Mr. Korman, sentence me to my merit. Thank you.

MS. FEENEY: Your Honor, just briefly. We've submitted papers on this issue but the Government opposes the motion based on extraordinary rehabilitation because legally, you have to look at the whole chain of events that is from the date of the murder, through the trial, and although the Government is not disputing that the defendant in this case became a border patrol guard and was indeed a good one, I think you have to look at the conduct that happened at trial, including the defendant's perjury and his use of the death of a fellow agent to try to explain away his confession, Your Honor.

He, more than anyone else, I think, as a law enforcement official who prosecuted people knows the importance of the oath and knew the importance of the oath and I think if you look at everything together, the extraordinary rehabilitation really implies coming to terms with what you've done. If you look at the whole thing, he's not met that standard here, Your Honor.

THE COURT: And you think a life sentence is appropriate here?

MS. FEENEY: Your Honor, I do.

[Pause in proceedings.]

THE COURT: I don't. Although the downward departure here is made extremely difficult by the fact that the defendant took the stand at his trial and did not testify truthfully. Up until that point in a trial, as I thought about what the sentence would be, I thought that this was an extraordinary case that would have warranted a downward departure, in part because of the extraordinary rehabilitation. In part, because when confronted following his arrest, he confessed immediately and in part, because my impression was that while we're all responsible for the choices that we make in life, he was someone who have could have gone the right way, was on a path to go the right way and may have very well have gone the right way, if it wasn't for his brother.

And I was quite frankly flabbergasted when he took the witness stand. It was a stupid decision and it's one that I am going to take into account in imposing sentence but it's not a factor that I think ought to result in the imposition of a life sentence.

I start off with the — and I also don't intend to ignore the guidelines here. I start off with what the guideline sentence would have been in this case if he had pled guilty. His current offense level is a 45 which is a mandatory life sentence under the guidelines. If he had pled guilty in a timely fashion, it would have been a 40, in part because of the 3 points off for a timely plea of guilty and in part because we would have never come to the perjury that was committed at trial. And that does, to a degree and has to impact on what a rational sentence would be here.

At a level 40, the guideline range was — is 292 to 365 months and it would have been a level from which I would have downwardly departed because of the circumstances here. And the consequence of the perjury — I don't care about the not pleading guilty. I don't think people should be punished for not pleading guilty but because of the perjury here, I'm not going to downwardly depart from that guideline range. In my own view, but for that, a sentence of twenty years might have been appropriate which is 240 months.

[Pause in proceedings.]

THE COURT: Do you want to call the nurse?

MR. SANTOS: Yes, Judge.

[Nurse came to help Defendant that passed out but was not unconscious upon her arrival.]

MR. SANTOS: Judge, my. client is ready to proceed.

THE COURT: I think I was saying that I might have considered downwardly departing to twenty years, perhaps fifteen but no lower than that because in my own view, I should be guided in part by the fact that fifteen years to life is what the minimum sentence is for murder in New York in a non-capital case; fifteen to life and indeed, as it happens, I am working on a habeas corpus case which involved the murder committed during the course of a robbery of a grocery store in which an innocent person was killed by someone who I suspect was roughly the same age as the defendant and which the Appellate Division reduced the sentence to twenty years to life.

But I'm not going to downwardly depart beyond the guideline range of 292 to 365 months. I think there's some merit to the Government's position that one cannot

ignore in this overall scheme what happened at the trial. On the other hand, I don't think it — what happened wipes out everything else and results in the imposition of a life sentence.

So, I'm going to sentence the defendant to the custody of the Attorney General for a period of 292 months, a period of five years supervised release and a special assessment of $300.00 which is — goes into a victim's compensation fund.

Notwithstanding his rehabilitation and the other extenuating circumstances I mentioned but cannot be lost sight of the fact that this was a cold-blooded murder and that the defendant is also being sentenced as well for his participation in drug distribution.

Mr. Soto, if I may, you have a right to an appeal both from the trial and the sentence and if you can't afford to pay the filing fee for the notice of appeal — to file the notice of appeal, I would allow you to do so without paying the filing fee. Do you understand that? Do you understand that? You have to speak.

THE DEFENDANT: Yes, sir.

THE COURT: All right. You'll file the notice of appeal?

MR. SANTOS: Yes, sir.

THE COURT: All right.

MS. FEENEY: Thank you, Your Honor.

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

/s/ LINDA FERRARA
LINDA FERRARA

Dated: March 12, 2000

28 U.S.C. § 2255

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

UNITED STATES CONSTITUTION, AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.